Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable	)	
Television Consumer Protection and Competition	)	CS Docket No. 94-48
Act of 1992	)	
	)	
Annual Assessment of the Status of Competition	)	
in the Market for the Delivery of Video Programming	)	

REPLY COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The comments submitted by DirecTV, Inc. properly focus the Commission's attention on what could become a significant problem for wireless cable operators -- securing access to digitally compressed programming. There is a substantial risk that the "Headend in the Sky" developed by Tele-Communications, Inc. ("TCI") will preempt programmers from providing their own digitally compressed signals to multichannel video programming distributors ("MVPDs"). Given the economics of digital compression, it is essential that wireless cable operators have access to centrally-compressed program feeds. TCI has reportedly asserted that it is not obligated under the 1992 Cable Act and the Commission's implementing rules to provide alternative MVPDs access to the digitally-compressed signal feeds it is selling. The Commission should disabuse TCI at this early juncture of the notion that it is immune from the ban embodied in Section 76.1002(b) of the Rules against unreasonable refusals to deal by satellite cable programming vendors engaged in the wholesale distribution for sale of satellite cable programming.

The Commission should also reject the effort of Time Warner Cable ("Time Warner") to subject wireless cable systems to local franchising requirements. In *Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990), the Commission correctly ruled that wireless cable systems are not subject to local franchising. While Time Warner's desire to subject its competitors to the burdens of local franchising is not surprising, Time Warner has utterly failed to present any logical reason for the Commission to revisit its prior ruling.

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys, hereby submits its reply to the certain of the initial comments submitted in response to the *Notice of Inquiry* ("*NOI*") commencing this proceeding. [1/]

As the comments submitted in response to the *NOI* by those who compete against the cable industry establish, while consumers are seeing benefits from the recent emergence of competition in the video distribution marketplace, there is much that Congress and the Commission can do to further competition. [2/] The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Commission's implementing rules

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[1/] *Implementation of Section 19 of the Cable Television Consumer Protection Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 94-119, CS Docket No. 94-48 (rel. May 19, 1994)[hereinafter cited as "*NOI*"].

[2/] *See, e.g.*, Comments of Wireless Cable Ass'n Int'l, CS Docket No. 94-48 (filed June 29, 1994); Comments of DirecTV, CS Docket No. 94-48 (filed June 29, 1994)[hereinafter cited as "DirecTv Comments"]; Comments of Liberty Cable Co., CS Docket No. 94-48 (filed June 29, 1994); Comments of Satellite Broadcasting and Communications Ass'n of America, CS Docket No. 94-48 (filed June 29, 1994).

have certainly improved the level of competition in the video distribution marketplace, yet they have not totally eliminated the potential for anti-competitive activities by the entrenched cable industry. The comments submitted in response to the *NOI* by DirecTV, Inc. ("DirecTV"), Liberty Cable Co., Inc. ("Liberty Cable"), Satellite Broadcasting and Communications Association of America, and other competitors to cable contain a myriad of suggestions that merit serious consideration by the Commission.

I. THE COMMISSION HAS ASSURED MVPDs FAIR ACCESS TO DIGITALLY COMPRESSED PROGRAMMING.

DirecTV in its comments focuses attention on what likely will be the most important program access issue facing alternative MVPDs in the coming years: the potential for abuse presented by the so-called "Headend-in-the-Sky" developed by Tele-Communications, Inc. ("TCI"). [3/] WCAI agrees with DirecTV that TCI's National Digital Television Center ("NDTC") could effectively deprive wireless cable and other competitors to cable television of critical access to digitally compressed programming sources. [4/] Given TCI's control over

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[3/]*See* DirecTV Comments, at 7-8.

[4/]Competitors to cable are not the only ones concerned about the potential anti-competitive impact of the National Digital Television Center. Indeed, when Sumner M. Redstone, Chairman of Viacom International, Inc. ("Viacom"), testified several months ago before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights concerning the anti-competitive abuses Viacom has suffered at the hands of TCI, he stated that the facility:

> will employ proprietary technology, as TCI sees fit, to encrypt, digitally compress, transmit and control signals from individual program services [and] will enable TCI to use new technology to create new bottlenecks in the distribution of cable programming services.

(continued...)

vast numbers of cable subscribers, and its offer to make access to the NDTC available to other cable operators, WCAI fears that program suppliers will refrain from undertaking the expense of providing multichannel video programming distributors ("MVPDs") with a direct digitally-compressed satellite feed as an alternative to the current analog feed.

The result will be that MVPDs will have to either secure digitally-compressed signals from NDTC or digitally compress the analog feed themselves. The latter alternative simply is not realistic. Given the $75,000-100,000 it costs to digitize and compress a single video channel, economics demand that even established cable operators demand employ a single, centralized source of digitized and compressed programming. As the *Chicago Tribune* emphatically reported, "Digital TV couldn't happen without a central facility to process programming once and make it available to all cable systems via satellite." [5/]

Yet, TCI's control over the central facility is fraught with peril. As one industry observer has noted, TCI's "headstart equates to big monopoly potential." [6/] Indeed, it is far from clear that wireless cable operators will have access to the NDTC. In a recent article in *Multichannel News*, Robert Thomson, a TCI senior vice president, was quoted as saying that

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[4/](...continued)
Testimony of Sumner M. Redstone before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, at 7 (Oct. 27, 1993).

[5/]Van, "Cable-TV Center Sees Future; And It's Full of Digital Compression; 500-Channel World Elusive," *Chicago Tribune*, C1 (May 23, 1994).

[6/]Steinert-Threlkeld, "Juggernaut in the Rockies," *Dallas Morning News*, 1D (May 11, 1994).

while TCI "would evaluate all comers," NDTC is not subject to the program access provisions of the 1992 Cable Act and "reserve[s] the right to provide services to parties of our choice." [7/]

To avoid delays in the future, the Commission should make clear at this early juncture that TCI's position is wrong. Section 76.1002(b) of the Commission's Rules clearly provides that no "satellite cable programming vendor in which a cable operator has an attributable interest" may unreasonably refuse to deal with alternative MVPDs. [8/] The NDTC is most certainly a "satellite cable programming vendor," as that term is defined in Section 76.1002(i) of the Commission's Rules -- "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming" [9/] and TCI, as the sole owner of NDTC, most certainly has an attributable interest in NDTC. Thus, there is no basis for TCI's assertion that NDTC is immune from the program access provisions of the 1992 Cable Act and the Commission's implementing rules.

II. THE COMMISSION SHOULD REJECT TIME WARNER'S EFFORT TO IMPOSE LOCAL FRANCHISE REQUIREMENTS UPON WIRELESS CABLE SYSTEMS.

As WCAI discussed in detail in its initial comments, it is inappropriate and counterproductive to require wireless cable system operators to secure local cable franchises where they do not utilize hard wire to cross public rights-of-way. [10/] Consistent with that

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[7/]Lambert, "Wireless Players Study TCI's Headend in the Sky," *Multichannel News*, at 38 (April 18, 1994).

[8/]*See* 47 C.F.R. § 76.1002(b) (1993).

[9/]47 C.F.R. § 76.1000(i) (1993)(emphasis added).

[10/]*See* WCAI Comments, at 18-19.

view, WCAI vigorously objects to the suggestion that by Time Warner Cable ("Time Warner") that the Commission revisit its decision in *Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990), exempting from local franchise regulation those MVPDs that rely upon wireless communications media to relay programming to their subscribers. [11/] While Time Warner focuses its attack on the use of radio to interconnect SMATV systems (presumably because of the success Liberty Cable has enjoyed in using 18 GHz microwave to relay programming to multiple dwelling units in competition with Time Warner), adoption of Time Warner's position would necessarily subject wireless cable systems to local franchise regulation.

In its *Report and Order* in *Definition of a Cable Television System* [the "*Cable Definition Order*"], the Commission ruled that a wireless cable system is not a "cable system" as defined in Section 602(6) of the Cable Communications Policy Act of 1984 (the "1984 Cable Act") [12/] because it relies solely upon radiated energy to transmit video programming

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[11/] *See* Comments of Time Warner Cable, CS Docket No. 94-48, at 24-29 (filed June 29, 1994).

[12/] Pub L. No. 98-549. Section 602(6) of the 1984 Cable Act is codified at 47 U.S.C. § 522(6). In implementing the 1984 Cable Act, the Commission amended its rules to incorporate the same definition of the term "cable system" included in the 1984 Cable Act. *See Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 1, 10-11 (1985), *modified in part on other grounds*, 104 F.C.C.2d 386, 396-97 (1986), *rev'd in part on other grounds sub nom.*, *ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

to subscribers' premises and is therefore exempt from the requirement of Section 621(b)(1) of the 1984 Cable Act that operators of cable systems secure local franchises. [13/]

In the *Cable Definition Order*, the Commission concluded that "Congress did not intend to include radio transmission services, such as DBS and MMDS, within the Act's definition of a cable system." [14/] WCAI wholeheartedly concurs with that conclusion. As will be demonstrated below, the language of Section 602(6) itself, as well as the legislative history of the 1984 Cable Act and opinions subsequently expressed by the major participants in the industry negotiations that led to the 1984 Cable Act, all support the conclusion that a wireless cable system is not a "cable system" for purposes of the 1984 Cable Act.

A. The Language of Section 602(6) Expressly Excludes Wireless Cable Systems From the Definition of "Cable System."

As the United States Supreme Court noted more than seventy years ago, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which . . . [it] is framed." [15/] The words of Section 602(6) of the 1984 Cable Act, therefore, must be the starting point of the Commission's effort to determine whether a wireless cable system is a "cable system" for purposes of that legislation.

With Section 602(6) of the 1984 Cable Act, Congress defined the term "cable system" as:

[13/] 5 FCC Rcd at 7638-39.

[14/] *Id.* at 7638.

[15/] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1916).

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.

WCAI agrees with the conclusion drawn by the Commission in the *Cable Definition Order* that the inclusion of phrase "set of closed transmission paths" in Section 602(6) was intended by Congress to draw a distinction between traditional coaxial cable systems and alternatives that utilize radiating technologies to deliver programming to subscribers' premises.

It is axiomatic that the sense of words used as terms of art in a particular discipline is the relevant sense for purposes of statutory construction where the statute being construed deals with that discipline. [16/] The phrase "set of closed transmission paths" includes just such terms of art which, while perhaps open to varying interpretations by laymen, had been given precise meanings by the Commission prior to the passage of the 1984 Cable Act. Although the Communications Act of 1934 did not contain any definition of the term "cable system" before being amended by the 1984 Cable Act, as addressed in the *Cable Definition Order*, [17/] the Commission had adopted an administrative definition of the term more than a decade earlier. A review of the Commission's consideration of that definition sheds a bright light on the intentions behind Congress' choice of terminology.

In 1972, the Commission expressly defined a cable system as a facility that delivered service by "wire or cable," clearly excluding wireless technologies from the scope of the

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[16/] *See, e.g.*, 2A D. Sands, Sutherland Statutory Interpretation, § 45.08 (Rev. 3d ed. 1973) [hereinafter cited as "Sutherland"].

[17/] *See* 5 FCC Rcd. at 7639.

definition. [18] In 1977, Commission revised the definition of "cable system" to substitute "a set of transmission paths" for "wire or cable." Although MDS-based wireless cable systems had already begun to compete with the cable industry by 1977, [19] the Commission's intention in revising the definition was not to sweep radiating systems within the definition. Rather, the revised definition was intended to make clear that interconnected cable systems were to be regulated by the Commission as a single system, regardless of whether the interconnection was made by wire, cable or private microwave. [20] Indeed, in revising its definition of "cable system" in 1977, the Commission emphasized that the phrase "a set of transmission paths" should "not be interpreted to include non-cable television broadcast station services as Multipoint Distribution Systems." [21]

Thus, the words "set of transmission paths" had a clear technical meaning by 1984, a meaning that excludes wireless cable technology. Moreover, contrary to the unsubstantiated assertion by Time Warner, [22] the addition of "closed" by Congress, moreover, further evidences an intention to exclude radiating technologies. The term "closed" is one that

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[18] *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143 (1972).

[19] *See* Kagan, The MDS Databook, at 8, 91 (Oct. 1984).

[20] *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 F.C.C.2d 956, 960 (1977).

[21] *Id.* at 965-66. Thus, Time Warner's contention that the word "path" somehow was intended to include wireless transmissions is fatally flawed. *See* Time Warner Comments, at 28 n. 31.

[22] *See id.* at 28.

historically had been employed by the Commission as a means of distinguishing coaxial cable systems from microwave links. [23] Therefore, the addition of the word "closed" to the phrase "closed set of transmission paths" further buttresses the evidence of Congressional intent to exclude from the scope of Section 602(6) systems that rely upon microwave transmissions, such as wireless cable.

From the foregoing, it is rather clear that the inclusion of the phrase "closed set of transmission paths" was intended by Congress to exclude radiating technologies from the scope of Section 602(6). Indeed, to interpret the phrase otherwise is to violate one of the cannons of statutory construction -- "a statute should not be interpreted in such a way as to render certain provisions superfluous or insignificant." [24]

Presumably, the words "closed set of transmission paths" were intended by Congress to have meaning. Yet, unless interpreted as words of limitation designed to exclude radiating systems, those words are mere surplusage, adding absolutely nothing to Section 602(6). Only by interpreting those words as excluding radiating systems such as wireless cable and DBS from the "cable system" definition can they be given any significance. Significantly, Time Warner provides no analysis of what the phrase "closed set of transmission paths" means, if it does not have the meaning found in the *Cable Definition Order*.

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[23] *See Amendment of Part 76 of the Commission's Rules to Modify Certain Technical Standards for Cable Television Systems*, 58 F.C.C.2d 1035, 1036 (1976).

[24] *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976), *citing* Sutherland, *supra* note 16, at § 46.06.

B. The Legislative History Supports The Commission's Interpretation Of The 1984 Cable Act.

To the extent that there is any ambiguity in the language of Section 602(6), the legislative history of the 1984 Cable Act provides persuasive evidence of Congressional intent to limit the definition of the term "cable system" to traditional cable systems, and not to include wireless alternatives.

First, and perhaps most significantly, Congress obviously equated the term "cable system" with traditional wire systems. For example, the Senate Committee on Commerce, Science and Transportation (the "Senate Committee") opened its report on S.66 (the Senate precursor of the 1984 Cable Act) with the following:

> This report will explain in great detail the legal and economic rationale for this legislation, S.66. But before describing the current status of the cable industry and its role in our national communications system and its position in the marketplace for telecommunications services, the committee believes that it is important to describe the components of a cable system.
>
> . . . A cable system distributes electromagnetic signals to subscribers' television sets via a cable or, more recently, by an optical fiber. These signals reach the viewer with the same clarity as seen at the point of origin.
>
> Cable systems receive programming either from antennae constructed on high ground that pick up signals off-the-air, or from microwave, or from satellite relays. The signals are then transmitted to a "headend" site where electronic equipment processes the signals for cable transmission into homes. The network of cable (or optical fiber) that carries the programming into the homes is either attached to utility poles or placed in underground conduits. [25/]

[25/] S. Rep. No. 98-67, 98th Cong., 1st Sess., at 4 (April 27, 1983) (emphasis added) [hereinafter cited as "Senate Report"].

Given this understanding by Congress of the nature of cable, it is not surprising, as the Commission correctly noted in the *Notice of Proposed Rulemaking* leading to the *Cable Definition Order*, that nowhere in the 1984 Cable Act or its legislative history is there any affirmative declaration of an intent to define "cable system" so broadly as to incorporate radiating services such as wireless cable. [26/]

Moreover, the Commission was also correct when it found such an omission to be significant because including radiating services within the definition would have represented a radical departure from prior practice. [27/] In adopting the 1984 Cable Act, Congress was well aware that wireless technologies which were not subject to the local franchise process had emerged to compete with the cable industry. [28/] Indeed, the emergence of these unfranchised alternative technologies was frequently cited in the legislative history as one of the primary rationales for substantially deregulating the cable industry. As explained by the Senate Committee:

[26/] *See Definition of a Cable Television System*, 4 FCC Rcd 2088, 2089.

[27/] *Id.*

[28/] It was well-established prior to the passage of the 1984 Cable Act that state and local governments could not require wireless cable operators to secure local franchises. In 1978, the Commission issued a declaratory ruling barring the New York State Commission on Cable Television from attempting to impose franchise obligations upon a wireless cable service in New York City, a decision that was subsequently affirmed by the United States Court of Appeals for the Second Circuit in 1982. *See Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *on reconsideration*,
82 F.C.C.2d 178 (1980), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (1982).

> Today cable faces major competition from such sources as MDS, MATV, SMATV, DBS, STV, television, radio, movie screens, video cassettes and videodiscs, LPTV, and other media. These services are by and large free from State and local intrusion into their business affairs. Thus the committee believes that there is no need for government at any level to continue to or begin to unduly regulate or otherwise impose unnecessary restrictions on the cable industry.
>
> The Committee believes that the increasingly competitive marketplace demands a corresponding alleviation of and elimination of government regulations on cable. [29/]

Similarly, the House recognized the emergence of alternative technologies subject to less stringent local regulation than that imposed on cable, and sought to reduce the burden on the cable industry. As noted by the House Committee on Energy and Commerce:

> FCC policies in the 1960s and early 1970s unfairly inhibited the growth and development of cable. Many of these policies have since been repealed or revised, but cable is still in many ways subject to more extensive regulations than other media of mass communications. At the same time, in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV and subscription television. The public interest is served by this competition, and it should continue. [30/]

[29/]Senate Report, *supra* note 25, at 30 (emphasis added). *See also id.* at 5 ("In our effort to encourage fair competition, to insure maximum service offerings, and to achieve parity of treatment among the providers of comparable telecommunications service, the committee believes that marketplace forces, rather than Government regulations, should prevail."); *id.* at 11 ("With the development of competitive programming services, the role of cable in our national telecommunications system has changed, and the need to regulate cable as was originally proposed by the Commission in 1972 is seriously in doubt.").

[30/]H. Rep. No. 98-934, 98th Cong., 2nd Sess., at 22-23 (Aug. 1, 1984) (emphasis added) [hereinafter cited as "House Report"].

These passages make rather apparent two facts: first, that Congress gave due consideration to the emergence of less extensively regulated wireless technologies; and, second, that Congress' goal was not to impose additional local regulation upon these technologies, but rather was to reduce the local regulation to which the cable industry was subjected so as to establish a more appropriate balance.

Indeed, it would have been entirely inconsistent with the underlying purpose of the 1984 Cable Act for Congress to require radiating technologies to secure local franchises. The 1984 Cable Act was passed by Congress for the express purpose of limiting local regulation of the cable industry to a level which is consistent with cable's use of the local streets and rights of way. As stated by the Senate Committee:

> In the past, local regulation bore a reasonable relationship to that use. With the introduction of cable into larger markets and the expansion of services provided over cable, the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way. S.66 seeks to restore the jurisdictional boundaries over cable to more traditional positions. As was pointed out by the FCC:
>
> The ultimate dividing line, as we see it, rests on the distinction between the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the States and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of the Commission. [31/]

Given Congress' stated goal of limiting local regulation of cable to issues relating to the use of streets and rights of way, it would be passing strange to attribute to Congress an

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[31/]Senate Report, *supra* note 25, at 6 (citations omitted). *See also* House Report, *supra* note 30, at 21-22.

intention to subject radiating systems that do not even use the local streets and rights of way to local franchising. Moreover, as noted by the Commission in the *Cable Definition Order,* a local franchising requirement is totally inappropriate to a regional service such as wireless cable (where a single system can serve areas over which numerous franchising authorities have jurisdiction). [32/]

C. In Statements Made After Passage Of The 1984 Cable Act, The Participants In The Industry Compromise That Led To The Legislation Recognized That Wireless Cable Systems Are Not Cable Systems.

The 1984 Cable Act was, in major part, the direct result of a compromise agreed to by the governing boards of both the National Cable Television Association ("NCTA") and the National League of Cities. [33/] While obviously neither of these parties can speak authoritatively as to Congressional intent, it is of no small significance that both organizations have since 1984 taken the positions inconsistent with wireless systems being treated as cable systems for purposes of the 1984 Cable Act. [34/] Indeed, in Congressional testimony, James P. Mooney, then the president of NCTA, expressly stated that "neither satellite video delivery

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[32/]5 FCC Rcd at 7639. To cite just one example, the wireless cable system operating in the Washington metropolitan area can provide service to the subscribers in, among other jurisdictions, District of Columbia, Montgomery County, Prince Georges County, Alexandria, Arlington County, and Fairfax County, all of which have their own franchising authorities.

[33/]*See* Senate Report, *supra* note 25, at 13-14.

[34/]*See* Reply Comments of National League of Cities, MM Docket No. 84-1296, at 48 (filed Feb. 11, 1985); National Cable Television Ass'n, "MMDS: The Realities of Program Access," Issues in Brief, Vol. 1, No. 1, at 2 (Nov. 1988).

or [*sic*] MMDS video delivery is subject to local regulation." [35/] Given NCTA's role in the development of the 1984 Cable Act, and the incentive of its constituent members to hamstring competitive technologies with additional regulation, Mr. Mooney's forthright concession is quite telling.

In short, the Commission was correct when in the *Cable Definition Order* it ruled that wireless cable systems were not "cable systems" for purposes of the 1984 Cable Act and that local authorities were therefore barred from imposing franchise regulation. Time Warner has failed to point to any error in that analysis.

[35/]Statement of James P. Mooney, President and CEO of NCTA, before the Subcommittee on Antitrust, Monopolies, and Business Rights of the Senate Committee on the Judiciary, at 78 (April 12, 1989).

III. CONCLUSION.

With the adoption of the 1992 Cable Act and the Commission's implementing rules, Congress and the Commission are well on their way to developing a competitive marketplace for the distribution of video programming. By adopting the proposals advanced by WCAI and the other MVPDs commenting in response to the *NOI,* while rejecting Time Warner's efforts to impose inappropriate franchise regulation on wireless cable operators, Congress and the Commission can expedite the day when cable systems all across America face effective competition.

Respectfully submitted,

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